

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 09/550,649	Applicant(s) GUERTIN ET AL.
Examiner DAVID S. KIM	Art Unit 2613

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 07 November 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-22.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
13. ☒ Other: See Continuation Sheet.

/Kenneth N Vanderpuye/
Supervisory Patent Examiner, Art Unit 2613

Continuation of 3. NOTE:

Applicant's proposed amendment introduces limitations absent from the previous version of the claims. In doing so, the proposed amendment raises new issues related to a change in the scope of the claims. A proper and sufficient response to these new issues would require further consideration and/or search.

For example, at least one newly introduced limitation absent from the previous version of the claims is:

(in independent claims 1, 5, and 9) by calculating Bit Interleave Parity for each frame and comparing it to calculated Bit Interleave Parity for a next frame.

Continuation of 11. does NOT place the application in condition for allowance because:

Applicant's arguments have been fully considered, but they are not persuasive. Applicant presents five salient points.

Regarding the first point, Applicant states:

"First, Applicants respectfully submit that the Juniper reference is disqualified prior art pursuant to 35 U.S.C. §103(c). Specifically, this reference is a publication of Ciena Corporation, the assignee of the present application" (REMARKS, p. 12, last paragraph).

Regarding the second point, Applicant states:

"Further, Applicant respectfully notes that the Juniper reference does not include a publication date. The Juniper reference does include dates of January 1999 on page 3 which are the dates the testing was performed at Ciena's validation labs. However, there is not a corresponding publication date listed on the reference" (REMARKS, p. 12, last paragraph).

However, both of these points are moot in view of the publication date of the Juniper reference provided by two corroborating websites: silicon.com and znet.co.uk (see the copy of the Juniper reference with the record of the search for the publication date and the confirmation of the publication date, noted in the form PTO-892 Notice of References Cited). Both of these websites show that the publication date of the Juniper reference is 11 January 1999. Since 11 January 1999 is more than one year before Applicant's filing date of 17 April 2000, the Juniper reference qualifies as a 102(b) prior art document. As a 102(b) prior art document, the exclusion under 103(c) does not apply. Accordingly, Applicant's first and second points are not persuasive.

Regarding the third point, Applicant states:

"Examiner is not persuaded by Applicants previous amendments and arguments with respect to simultaneously testing and isolating errors. Examiner cites Waschka Jr. at col. 19, lines 30-59 for teaching the diagnostic signal functionality. However, Waschka Jr. teaches isolating the fault location through "sequential testing of the stations along the channel" (see Waschka Jr. at col. 19, lines 40-41). Applicants are unclear as how Waschka Jr. can be modified with Hoogerbrugge to provide fault isolation while simultaneously testing the communication channel in a cascaded fashion. Applicants respectfully agree that simultaneous testing is a suitable alternative to sequential testing; however, Applicants do not agree that the combination of references teach simultaneous testing cascaded channels while isolating faults to a specific channel at the same time" (REMARKS, p. 14, last full paragraph).

Examiner respectfully notes that Applicant's specification does not support the simultaneous occurrence of these two events: (1) fault isolation and (2) testing the communication channel in a cascaded fashion. That is, Applicant's specification teaches that these two events occur in a chronological order. First, "testing the communication channel in a cascaded fashion" occurs (p. 11, l. 1-3). Second, "fault isolation" occurs (p. 11, l. 3-11). Similarly, the prior art of record teaches, first, "testing the communication channel in a cascaded fashion" (Waschka, Jr., col. 19, l. 25-28), and, second, "fault isolation" (Waschka, Jr., col. 19, l. 30-42). Regarding "simultaneous testing cascaded channels", the prior art of record teaches "testing cascaded channels" (Waschka, Jr., col. 19, l. "sequential testing" in col. 19, l. 42) and also teaches the obvious variation of "simultaneous" testing (Hoogerbrugge, p. 977, col. 1, 2nd to last paragraph). Accordingly, Applicant's third point is not persuasive.

Regarding the fourth point, Applicant states:

"Applicants respectfully submit that the performance monitor and diagnostic signals are not taught by Waschka Jr. Waschka Jr. only teaches sequential testing. The purpose of the performance monitor and the diagnostic signals is to enable the isolation of as few as one bit error in order to significantly reduce testing time and equipment. Waschka Jr. specifically teaches sequential testing. Accordingly, Waschka Jr. cannot teach the performance monitor and diagnostic signals since these specifically function to enable simultaneous testing and isolation which Waschka Jr. specifically teaches against" (REMARKS, p. 14-15, bridging paragraph).

Examiner respectfully notes that the standing rejections do not rely on Waschka, Jr. for teachings of "simultaneous testing". Rather, the standing rejections recognize this point and rely on Hoogerbrugge for teachings of "simultaneous testing" (p. 977, col. 1, 2nd to last paragraph). Accordingly, Applicant's fourth point is not persuasive.

Regarding the fifth point, Applicant relies on new limitations introduced by Applicant's proposed amendment. As noted above, Applicant's

proposed amendment will not be entered. Accordingly, Applicant's fifth point is moot.

Summarily, Applicant's arguments are not persuasive. Accordingly, Examiner respectfully maintains the standing rejections.

Continuation of 13. Other:

CLAIM OBJECTIONS

Applicant's response to the objection to claim 5 in the previous Office Action (mailed on 10 September 2008) is noted and appreciated. Applicant responded by filing proposed amendments to claim 5. Applicant's response would overcome the previous objection to claim 5 if the proposed amendment to claim 5 were to be entered.

CLAIM REJECTIONS - 35 U.S.C. 112

Applicant's response to the two sets of rejections of claims 1-22 under 35 U.S.C. 112, first paragraph, in the previous Office Action (mailed on 10 September 2008) is noted and appreciated. Applicant responded by filing proposed amendments to independent claims 1, 5, and 9. Applicant's response would overcome the previous two sets of rejections of claims 1-22 if the proposed amendments to independent claims 1, 5, and 9 were to be entered.